

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**
2 **February 10, 2012**

3 **NO. 33,386**

4 **ANTONIO MAESTAS and**
5 **BRIAN EGOLF, members of**
6 **the New Mexico House of Representatives,**
7 **and JUNE LORENZO, ALVIN WARREN,**
8 **ELOISE GIFT and HENRY OCHOA,**

SUPREME COURT OF NEW MEXICO
FILED

FEB 10 2012



9
10 Petitioners,

11 v.

12 **HON. JAMES A. HALL, District Judge**
13 **Pro Tempore of the First Judicial District**
14 **Court,**

15
16 Respondent,

17 and

18
19 **SUSANA MARTINEZ, in her capacity as**
20 **Governor of New Mexico, et al.,**

21 Real Parties in Interest,

22 and

23 **MAURILIO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGUIN, HAKIM**
24 **BELLAMY and ROXANE SPRUCE BLY, PUEBLO OF LAGUNA,**
25 **PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF**
26 **ZUNI, PUEBLO OF SANTA ANA, PUEBLO OF ISLETA, RICHARD**
27 **LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA**
28 **AND LEON REVAL, NAVAJO NATION, LORENZO BATES, DUANE H.**
29 **YAZZIE, RODGER MARTINEZ, KIMMETH YAZZIE AND ANGELA**

1 **BARNEY NEZ,**

2
3 Intervenors.

4 and

5 **NO. 33,387**

6 **TIMOTHY Z. JENNINGS, in**
7 **his official capacity as President**
8 **Pro-Tempore of the New Mexico**
9 **Senate, and BEN LUJAN, SR., in**
10 **his official capacity as Speaker of**
11 **the New Mexico House of Representatives,**

12 Petitioners,

13 v.

14 **THE NEW MEXICO COURT OF APPEALS,**

15 Respondent,

16 and

17 **DIANNA J. DURAN, in her official**
18 **capacity as New Mexico Secretary of State,**
19 **SUSANA MARTINEZ, in her capacity as**
20 **New Mexico Governor, and JOHN A.**
21 **SANCHEZ in his official capacity as New**
22 **Mexico Lieutenant Governor and presiding**
23 **officer of the New Mexico Senate,**

24 Real Parties in Interest,

25 and

1 JONATHAN SENA, DON BRATTON, CARROLL LEAVELL, GAY
2 KERNAN, CONRAD JAMES, DEVON DAY, MARGE TEAGUE, MONICA
3 YOUNGBLOOD, JUDY MCKINNEY, JOHN RYAN, MAURILIO CASTRO,
4 BRIAN F. EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY AND
5 ROXANE SPRUCE BLY, PUEBLO OF LAGUNA, PUEBLO OF ACOMA,
6 JICARILLA APACHE NATION, PUEBLO OF ZUNI, PUEBLO OF SANTA
7 ANA, PUEBLO OF ISLETA, RICHARD LUARKIE, HARRY A. ANTONIO,
8 JR., DAVID F. GARCIA, LEVI PESATA AND LEON REVAL, NAVAJO
9 NATION, LORENZO BATES, DUANE H. YAZZIE, RODGER MARTINEZ,
10 KIMMETH YAZZIE AND ANGELA BARNEY NEZ,

11 Intervenor.

12 ORDER

13 WHEREAS, this matter came on for consideration upon petitions for writs of
14 superintending control and certification from the New Mexico Court of Appeals, the
15 Court having considered the briefing and oral argument of the parties and being
16 sufficiently advised, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice
17 Richard C. Bosson, and Justice Edward L. Chavez, concurring, Judge Jonathan B.
18 Sutin dissenting;

19 NOW, THEREFORE, IT IS ORDERED that the district court's judgment and
20 final order regarding the creation of districts for the New Mexico House of
21 Representatives is REVERSED and REMANDED for further proceedings consistent
22 with the reasons and directions that follow:

1 INTRODUCTION

2 At issue in this case is the apportionment of the New Mexico House of
3 Representatives following the 2010 federal census. *Profile of General*
4 *Characteristics for the United States*, United States Census Bureau (2010). The
5 House of Representatives must be composed of seventy members elected from single-
6 member districts. N.M. Const. art. IV, § 3(C). The Legislature may by statute
7 reapportion its membership after every decennial census. N.M. Const. art. IV, § 3(D).
8 The 2010 census indicates that the population in New Mexico is 2,059,179 people,
9 an increase of 13.2 percent over the 2000 census. In order to achieve the ideal
10 population, under the one person one vote principle, each House District should have
11 a population of 29,417 people. The current House Districts have population
12 deviations from the ideal population ranging from negative 24.3 percent to a positive
13 100.9 percent, for a total deviation range of 125.2 percent. **[FOF 2-6]** The
14 population growth in West Albuquerque and Rio Rancho indicate that this area can
15 support three additional house districts. Slower growth in North Central and
16 Southeastern New Mexico, as well as Central Albuquerque, indicate that these areas
17 each currently have one additional district, or so the court below could reasonably
18 find. **[FOF 9-11]**

1 It is undisputed that the existing House Districts are unconstitutionally
2 apportioned. *See Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (interpreting the Equal
3 Protection Clause to require “a State to make an honest and good faith effort to
4 construct districts, in both houses of its legislature, as nearly of equal population as
5 is practicable”). Thus, significant changes in the districts are necessary to comply
6 with the one person, one vote mandate of the Equal Protection Clause. The House
7 of Representatives, during a 2011 Special Session called for the purpose of
8 reapportionment, passed House Bill 39 reapportioning the House. Every Republican
9 legislator and two Democrat legislators voted against House Bill 39, and Governor
10 Susana Martinez ultimately vetoed it.¹ Because the lawmaking process failed to
11 create constitutionally acceptable districts, the burden fell on the judiciary to draw a
12 reapportionment map for the House. To accomplish this task, we designated retired
13 Judge James Hall, a hard-working jurist with an impeccable reputation for fairness
14 and impartiality, to assume this arduous undertaking.

15 After eight days of testimony and the submission of numerous reapportionment
16 maps by the parties, Judge Hall adopted, in part, the third alternative plan submitted

17 ¹The Legislature was unable to pass reapportionment legislation relating to the
18 state Senate, Congress, or the Public Regulation Commission.

1 by the attorneys representing Governor Martinez and Lieutenant Governor John
2 Sanchez. Executive Alternative Plan 3 was developed in part to address criticisms
3 from other demographers who testified during the trial, and to incorporate Judge
4 Hall's suggestion that the Multi-Tribal/Navajo Nation plan addressing Voter Rights
5 Act issues in the Northwestern region of New Mexico be included in the executive
6 plan. The adopted plan was tendered on the last day of testimony after the executive
7 demographer and other expert witnesses were not available to testify. However,
8 Brian Sanderoff, a local demographer, did testify about Executive Alternative Plan
9 3.

10 The district court entered detailed findings of fact and conclusions of law
11 regarding Executive Alternative Plan 3 and the rejected plans submitted by other
12 parties, including the plan passed by the Legislature as House Bill 39. The legislative
13 plan was rejected because it systematically left North Central and Southeastern New
14 Mexico underpopulated, which diluted the votes of the persons in the more populated
15 areas of the state: specifically west Albuquerque, Rio Rancho, and Doña Ana
16 County. **[FOF 41]** An overriding, related concern included the failure of the
17 legislative plan to consolidate a district in North Central New Mexico. **[FOF 35]** The
18 district court rejected another proposed plan because of "significant partisan bias."

1 [FOF 87] It rejected one plan because of “highly partisan incumbent pairings” [COL
2 30] and another plan because of the pairing of “the only Republican incumbent in
3 north central New Mexico with a Democratic incumbent and splits Los Alamos and
4 White Rock.” [COL 29] Other plans were rejected because of the failure “to establish
5 Native American districts as contained in the Multi-Tribal/Navajo Nation Plan under
6 the Voting Rights Act.” [COL 31, 32] The district court adopted Executive
7 Alternative Plan 3, with some additional modifications, because it found that it had
8 the lowest population deviations between districts, it adhered to the Voting Rights
9 Act, and it reasonably satisfied secondary reapportionment policies. [COL 34-36]
10 The district court acknowledged that Executive Alternative Plan 3 impacted partisan
11 performance measures, but determined that, because all of the plans had some
12 partisan effect, it was compelled not to allow partisan considerations to control the
13 outcome of its decision. [COL 35]

14 We agreed to hear arguments on Petitioners’ petitions for writs of
15 superintending control and established an extremely expedited briefing schedule
16 designed to permit this Court to conduct oral argument on February 7, 2012. After
17 considering the written submissions of the parties and hearing oral argument, we
18 remand this matter to the district court for further proceedings consistent with this

1 order. A formal opinion will be issued at a later date; however, this order is intended
2 to outline the holding of this Court.

3 ANALYSIS

4 A. Legal principles

5 1. Redistricting is primarily the responsibility of the State Legislature.
6 Therefore, plans that the Legislature has passed but have failed to be enacted into law,
7 such as House Bill 39, are due “thoughtful consideration.” *See Sixty-Seventh Minn.*
8 *State Senate v. Beens*, 406 U.S. 187, 197 (1972).

9 2. State legislative district plans require only “substantial” population equality.
10 *See Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

11 3. When called upon to draw a redistricting map, a court acts in equity and
12 may adopt a plan submitted by a party, modify such a plan, or draw its own map. *See*
13 *O’Sullivan v. Bryer*, 540 F. Supp. 1200, 1202-03 (D. C. Kan. 1982).

14 4. Deviations from population equality are appropriate to address significant
15 state policies or unique features. *See Reynolds*, 377 U.S. at 579. Although maximum
16 population equality and whether a plan dilutes the vote of any racial minority are
17 primary considerations, courts should consider “the policies and preferences of the
18 State, as expressed in statutory and constitutional provisions or in the

1 reapportionment plans proposed by the state legislature, whenever adherence to state
2 policy does not detract from the requirements of the Federal Constitution.” *White v.*
3 *Weiser*, 412 U.S. 783, 795 (1973). Adhering to state policies is a way in which courts
4 can give effect to the will of the majority of the people. *Preisler v. Secretary of State*,
5 341 F. Supp. 1158, 1161-62 (D.C. Mo. 1972).

6 5. It is important to consider whether a plan continues the policies of New
7 Mexico as they are expressed in its previous redistricting plans. *See White*, 412 U.S.
8 at 795-96 (1973). The guidelines that were unanimously adopted by the bi-partisan
9 New Mexico Legislative Council set forth policies that are similar to policies that
10 have been recognized as legitimate by numerous courts, as well as courts of this state,
11 and should be considered by a state court when called upon to draw a redistricting
12 map. The policies set forth in the guidelines include the following:

13 a. *Maintaining low population deviations from equal districts using data*
14 *from the most recent U.S. Census.* Legislative plans with deviations greater than
15 plus-or-minus five percent are prima facie unconstitutional and require a showing that
16 greater deviations are justified by a legitimate state purpose. *See Brown v. Thompson*,
17 462 U.S. 835, 842 (1983). This principle was most recently applied ten years ago,
18 when the state district court utilized a range of plus-or-minus five-percent deviations

1 in creating a redistricting plan for the House of Representatives. *Jepsen v. Vigil-*
2 *Giron*, No. D-0101-CV-02177 (D. Ct. Jan. 24, 2002).

3 b. *Comporting with the Voting Rights Act and federal constitutional*
4 *standards.* For the purposes of Section 2 of the Voting Rights Act, only eligible
5 voters affect a group's opportunity to elect candidates. Therefore, the question is
6 whether the minority group has a citizen voting-age majority in the district. *League*
7 *of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 427-28 (2006).
8 Also under Section 2, because the injury is vote dilution, the *Gingles* compactness
9 inquiry considers "the compactness of the minority population, not . . . the
10 compactness of the contested district." *Bush v. Vera*, 517 U.S. 952, 997 (Kennedy,
11 J., concurring) (referencing *Thornburg v. Gingles*, 478 U.S. 30 (1986)). Race may
12 be considered, but not as a predominant consideration over traditional redistricting
13 principles, which are outlined below. A district that "reaches out to grab small and
14 apparently isolated minority communities" is not reasonably compact. *Id.* at 979.
15 Section 2 compactness should take into consideration "traditional districting
16 principles such as maintaining communities of interest and traditional boundaries."
17 *Id.* at 977; *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993) (reasoning that traditional
18 districting principles "are important not because they are constitutionally

1 required—they are not—but because they are objective factors that may serve to
2 defeat a claim that a district has been gerrymandered on racial lines.” (internal
3 citation omitted)).

4 c. *Using single-member districts.* N.M. Const. art. IV § 3(C).

5 d. *Drawing districts with traditional redistricting principles:*

6 i. *Districts shall be composed of contiguous precincts and be*
7 *reasonably compact. See, e.g., NMSA 1978 § 2-7C-3. Compactness and contiguity*
8 *reduce travel time and costs, and therefore make it easier for candidates for the*
9 *Legislature to campaign for office, and once elected, to maintain close and continuing*
10 *contact with the people they represent. It has also been suggested that compactness*
11 *and contiguity greatly reduce, although they do not eliminate, the possibilities of*
12 *gerrymandering. Daniel D. Polsby & Robert D. Popper, *The Third Criterion:**
13 *Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale

14 L. & Pol’y Rev. 301.

15 ii. *Consideration of political and geographic boundaries.*
16 Minimizing fragmentation of political subdivisions, counties, towns, villages, wards,
17 precincts, and even neighborhoods allows constituencies to organize effectively and
18 decreases the likelihood of voter confusion regarding other elections based on

1 political subdivision geographics. *See Prosser v. Elections Bd.*, 793 F. Supp. 859,
2 863 (1992).

3 iii. *Preserving clear communities of interest.* We interpret
4 communities of interest to include a contiguous population which shares common
5 economic, social, and cultural interests that should be included within a single district
6 for purposes of its effective and fair representation. *See O'Sullivan*, 540 F. Supp. at
7 1204. The rationale for giving due weight to other types of clear communities of
8 interest is because “to be an effective representative, a legislator must represent a
9 district that has a reasonable homogeneity of needs and interests; otherwise the
10 policies he supports will not represent the preferences of most of his constituents.”
11 *Prosser*, 793 F. Supp. at 863.

12 iv. *Preserving cores of existing districts.*

13 e. *Choosing to avoid contests between incumbents running for*
14 *reelection is an optional consideration.* *Karcher v. Daggett*, 462 U.S. 725, 740
15 (1983). Incumbency considerations, however, cannot be justified if they are simply
16 for the benefit of the officeholder and not in the interests of the constituents. *See*
17 *LULAC v. Perry*, 548 U.S. 399, 441 (2006).

18 6. The most fundamental tenet of judicial administration and independence is

1 that the process must be fair, and it must also appear to be fair. *See Peterson v Borst*,
2 786 N.E.2d 668, 673 (Ind. 2003). Because the redistricting process is embroiled in
3 partisan politics, when called upon to draw a redistricting map, a court must “do so
4 with both the appearance and fact of scrupulous neutrality.” *Id.* at 673. To avoid the
5 appearance of being embroiled in partisan politics, a judge should not select a plan
6 that seeks partisan advantage. Thus, a proposed plan that seeks to change the ground
7 rules so that one party can do better than it would do under a plan drawn up by
8 persons having no political agenda is unacceptable for a court-drawn plan. *See*
9 *Wilson v. Eu*, 823 P.2d 545, 576-77 (1992) (“[T]he submission of three plans, each
10 with calculated partisan political consequences (the details of which are unknown)
11 creates a severe dilemma for us. We have no principled way to choose between the
12 plans, especially knowing that we would be endorsing an unknown but intended
13 political consequence by the choice we make. For this reason alone we would feel
14 compelled to reject the plans.”). A court’s adoption of a plan that represents one
15 political party’s idea of how district boundaries should be drawn does not conform
16 to the principle of judicial independence and neutrality. *Peterson*, 786 N.E.2d at 673.
17 Although some courts are indifferent to political considerations such as incumbency
18 or party affiliation, *Burling v. Chandler*, 804 A.2d 471, 474 (N.H. 2002), other courts

1 question the wisdom of such indifference, *Gaffney v. Cummings*, 412 U.S. 735, 753
2 (1973) (“It may be suggested that those who redistrict and reapportion should work
3 with census, not political, data and achieve population equality without regard for
4 political impact. But this politically mindless approach may produce, whether
5 intended or not, the most grossly gerrymandered results.”).

6 7. Although asymmetry (partisan bias) is not a reliable measure of
7 *unconstitutional* partisanship, *LULAC v. Perry*, 548 U.S. 399, 420 (2006), it should
8 be considered as “a measure of partisan fairness in electoral systems,” *id.* at 466
9 (Stevens, J., concurring).

10 8. This is the first opportunity in this State’s long history for the Supreme
11 Court to address the overarching legal principles that govern court-drawn
12 redistricting, and it is only the second time for any court in our state judiciary to have
13 done so. Accordingly, it is incumbent on this Court to recognize or ratify those legal
14 principles that vindicate statutory and constitutional imperatives while also
15 supporting significant, legitimate state policies that are vital for redistricting.
16 Because of our role as final arbiter of state law, it is important that we review this
17 case largely under a *de novo* standard, so as to provide guidance both to the court
18 below and to future courts tasked with redistricting. Contrary to the views of the

1 dissent, our job here is not merely to review for an abuse of discretion or substantial
2 evidence. The Supreme Court has a constitutional mandate to establish what the rule
3 of law is and to clarify the law if it has not been interpreted correctly. It would be
4 unsound jurisprudence to do otherwise.

5 **B. Specific issues in this case.**

6 Applying these principles to the case before us, we conclude as follows:

7 1. Pursuit of precise population equivalence at the cost of other, legitimate
8 state redistricting policies, such as those adopted by the bi-partisan Legislative
9 Council, is inconsistent with existing legal principles and with the established
10 precedent and custom of this State. When other policies, such as avoiding bifurcation
11 of municipalities and other recognized communities of interest, can be obtained with
12 population deviations within the more flexible deviations applied historically, it is the
13 duty of the court to accommodate those legitimate state interests, where feasible, or
14 explain why it could not do so. *See Jepsen v. Vigil-Giron*, No. D-0101-CV-02177 (D.
15 Ct. January 24, 2002). The same holds true for plans that inflict significant partisan
16 bias, even if it is unintended, if that bias can be ameliorated through the use of
17 permissible, greater population deviations. In this case, the district court concluded
18 that it was bound to a plus-or-minus one-percent population deviation with the

1 exception of addressing Voting Rights Act infractions. That conclusion is
2 inconsistent to the extent it precludes greater deviations where justified by existing
3 legal principles and by the precedent and policy of this State, which requires a remand
4 for the court to address the issues set forth in this order. It is also inconsistent with
5 *Jepsen*, where Judge Allen allowed greater deviations and did not permit radical or
6 partisan changes unless the law required. *Id.* at 8, 12.

7 2. The district court was not indifferent to partisan considerations. It
8 considered evidence regarding the partisan bias of various plans, and acknowledged
9 the same in its findings and conclusions of law. However, the plan ultimately
10 adopted by the district court, Executive Alternative Plan 3, did not undergo the same
11 scrutiny for partisan bias that the majority of plans previously considered had
12 undergone. The plan adopted by the district court was introduced into evidence on
13 the last day of trial during the testimony of Brian Sanderoff, who pointed out the
14 existence of significant partisan performance changes as a result of that plan.
15 [12/22/11 pgs. 55-66] Consistent with that testimony about partisan performance
16 changes, the district court found, as well, that Executive Alternative Plan 3 increased
17 Republican swing seats from five to eight over prior executive plans. In addition, the
18 number of majority Republican districts increased from 31 in the original executive

1 plan to 34 in Executive Alternative Plan 3. **[FOF 72]** Mr. Sanderoff testified that
2 Executive Alternative Plan 3 could have been drafted with less partisan change and
3 bias, perhaps with the use of slightly greater population deviations. **[12/22/11 Tr.**
4 **118-119]** Because of this testimony and the district court's rejection of other plans for
5 perceived partisan bias considerations, and because of its own recognition of that fact
6 in the proffered plan, the district court should have rejected Executive Alternative
7 Plan 3 for similar bias, at least as it was offered.

8 3. The incumbent pairings in Executive Alternative Plan 3 appear to have
9 contributed to the partisan performance changes in the plan. In three consolidations,
10 the resulting shift of six seats created a partisan swing of two seats in favor of one
11 party. The three new seats, two Republican and one Democrat, correctly reflected the
12 political affiliation of the population in those high-growth areas on the west side of
13 Albuquerque and in Rio Rancho, a result we do not question. However, the source
14 of those three seats is subject to question for partisan bias. Two of the consolidated
15 seats, one a Democrat-Democrat consolidation in North Central New Mexico, and the
16 other a Republican-Republican consolidation in Southeastern New Mexico, are
17 partisan-neutral in effect. The third consolidated district, in Central Albuquerque,
18 however, raises questions. Despite combining a Republican and a Democrat seat, it

1 resulted in a strongly partisan district favoring one party, in effect tilting the balance
2 for that party without any valid justification. The resulting district is oddly shaped
3 in an area where compactness is apparently relatively easy to achieve, suggesting, at
4 least in part, that the district was created to give political advantage to one party.
5 This result was not politically neutral and raises serious questions as to its propriety
6 in a court-ordered plan that should be partisan-neutral and fair to both sides.

7 4. The district court made findings of fact related to Clovis, New Mexico that
8 satisfied the precondition criteria for a Voting Rights Act analysis as it relates to the
9 Hispanic population in this area. The district court specifically found that “[t]he
10 Hispanic community in and around Clovis is sufficiently large and geographically
11 compact to constitute a majority in a single-member district,” that the community “is
12 politically cohesive,” and that “Anglos in the area vote sufficiently as a bloc to enable
13 them to usually defeat the minority’s preferred candidate.” **[FOF 64, 65]** Previously,
14 a federal three-judge panel, having found a detailed history of racial and ethnic
15 discrimination affecting that same population, redrew House District 63 to include
16 compact and politically cohesive Clovis minorities and make the district a
17 performing, effective majority-minority district, as that term is commonly understood
18 in Voting Rights Act jurisprudence. *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984).

1 Though redrawn in shape, that district has remained an effective majority-minority
2 district since that time, including the most recent court-ordered redistricting plan in
3 the *Jepsen* case. In the present trial, there was no evidence to establish that the
4 district had materially changed so as to no longer require an effective majority-
5 minority district. Therefore, those same considerations that led to a redrawing of
6 House District 63 continue to apply to that community, and must be reflected in any
7 court-ordered plan.

8 5. We agree with the district court on the following points:

9 a. Including the Native American districts as contained in the Multi-
10 Tribal/Navajo Nation Plan is essential under the Voting Rights Act and shall be
11 included without the need for any change in the court-drawn map.

12 b. Although consolidation of districts coupled with moving one of the
13 consolidated districts is not the only way to address population disparities when
14 drawing new district boundaries to comply with the Equal Protection Clause, in this
15 case the district court appropriately exercised its equitable powers to insist on the
16 consolidation of districts in the underpopulated regional areas of North Central and
17 Southeastern New Mexico, as well as Central Albuquerque. The problems previously
18 noted with the Central Albuquerque consolidation go not to the fact of consolidation,

1 but to the resulting manner in which it was accomplished.

2 c. The district court was not required to adopt the legislative plan in
3 House Bill 39, as long as it gave that plan thoughtful consideration.

4 d. The district court was not required to preclude Governor Martinez
5 from introducing redistricting plans during the litigation, despite the district court's
6 findings that the Governor did not submit redistricting plans during the special
7 session.

8 **C. Remand instructions.**

9 For the reasons stated above, this matter is remanded to the district court to
10 draw a reapportionment map with the assistance of an expert under Rule 11-706
11 NMRA. In doing so, the district court should rely, as much as possible, on the
12 evidence presently in the record, and it should not admit additional evidence from the
13 parties. The district court should consider historically significant state policies as
14 discussed herein through the use, where justified, of greater population deviations as
15 set forth in the Legislative Council guidelines. At the district court's discretion, the
16 parties may be permitted, but are not entitled, to file briefs identifying what state
17 policies are supported by the evidence in the record that will assist the court in
18 drawing a plan that results in less partisan performance changes and fewer divisions

1 of communities of interest than the plan it adopted. Also in the district court's
2 discretion, Brian Sanderoff would be a permissible candidate to serve as a Rule 11-
3 706 expert, because of time constraints and his established expertise. Whether or not
4 to use any of the maps that were introduced into evidence as a starting point,
5 including Executive Alternative Plan 3, is within the discretion of the district court.
6 The parties shall have an opportunity to comment on a preliminary plan proposed by
7 the district court before it ultimately adopts a final plan. The final map must take into
8 account the following considerations:

9 1. *Population deviations.* Executive Alternative Plan 3 achieved very low
10 population deviations, but it was at the expense of other traditional state redistricting
11 policies, the most evident being the failure to keep communities of interest, such as
12 municipalities, intact. Some cities were divided to maintain low population
13 deviations among the different districts. On remand, the district court should
14 consider whether additional cities, such as Deming, Silver City, and Las Vegas, can
15 be maintained whole through creating a plan with greater than one-percent deviations.
16 While low population deviations are desired, they are not absolutely required if the
17 district court can justify population deviations with the non-discriminatory
18 application of historical, legitimate, and rational state policies.

1 2. *Partisan performance changes.* On remand, the goal of any plan should be
2 to devise a plan that is partisan-neutral and fair to both sides. If the district court
3 chooses to begin with the plan it adopted previously, it should address the partisan
4 performance changes and bias noted in this order, and if the bias can be corrected or
5 ameliorated with enunciated non-discriminatory application of historical, legitimate,
6 and rational state policies, including through the use of higher population deviations,
7 then the district court should do so.

8 3. *As part of the review of partisan performance changes, the district court*
9 *should consider the partisan effects of any consolidations.* Any district that results
10 from a Democrat-Republican consolidation, if that is what the district court elects to
11 do, should result in a district that provides an equal opportunity to either party. In the
12 alternative, some other compensatory action may be taken to mitigate any severe and
13 unjustified partisan performance swing. The performance of created districts as well
14 as those left behind should be justified.

15 4. *Hispanic “Majority” District in House District 67.* It does not appear that
16 the district court considered Hispanic citizen voting age populations in reaching its
17 decision, and it should do so on remand. Whatever its eventual form, the relevant
18 Clovis community must be represented by an effective, citizen, majority-minority

1 district as that term is commonly understood in Voting Rights Act litigation, and as
2 it has been represented, at least in effect, for the past three decades.

3 *Time is of the essence.* The district court is urged to make every effort to
4 conclude this matter expeditiously, no later than February 27th, 2012, or otherwise
5 advise this Court. Because this Court has announced in this order the legal principles
6 that will govern court-drawn redistricting maps in New Mexico, any appeal of the
7 district court's final map will only be reviewed for an abuse of discretion or for
8 substantial evidence.

9 In conclusion, we note the extraordinary work of Judge Hall in this case, and
10 we are mindful of the extra demands imposed upon him by this remand order. His
11 service on behalf of the State of New Mexico is greatly appreciated.

12 **IT IS SO ORDERED.**

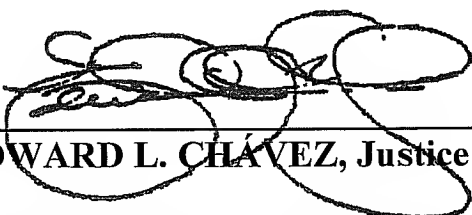
13 
14 **PATRICIO M. SERNA, Justice**

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16 **PETRA JIMENEZ MAES, Justice**
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RICHARD C. BOSSON, Justice



EDWARD L. CHÁVEZ, Justice

JONATHAN B. SUTIN, Judge
Sitting by designation, dissenting

1 **SUTIN, Judge (dissenting).**

2 The Majority's decision that its order be filed immediately has allowed me time
3 and opportunity to only generally address why I oppose the remand requiring Judge
4 Hall to revamp the plan according to the rules laid down by the Majority. The
5 immediacy has not allowed me time and opportunity to rebut the Majority's
6 determinations on the merits of the issues as contained in the order. Based on the
7 detail in the order deciding the merits of the issues, and the requirement that Judge
8 Hall change the plan, I tend to doubt that any follow-up Majority opinion will be
9 needed, and I tend to doubt that the extensive detailed work required for a dissent will
10 be useful.

11 I respectfully oppose entry of the Majority's remand order. There exists no
12 need to require Judge Hall to consider facts and law that he has already thoroughly
13 considered. There exists no need for reconsideration of how Judge Hall applied the
14 law of population deviation when it is clear that he understood the law and did not
15 misapply it. Nor is there a need to remand for Judge Hall to reconsider facts
16 (implying, it seems, to also change his mind) relating to any alleged Fourteenth
17 Amendment or Voting Rights Act violation or relating to secondary factors such as
18 communities of interest.

1 Of course, this Court is not to rubber stamp Judge Hall's work and plan. At the
2 same time, however, it is important to note that the Supreme Court's appointment of
3 Judge Hall was purposeful and an excellent choice. Judge Hall was a highly
4 respected judge for his fairness, good judgment, principled and rational decisions,
5 seasoned analytic ability, and his ability to grasp complex issues. In his known
6 judicial capacity, Judge Hall did not act arbitrarily. In these important circumstances,
7 Judge Hall would not and did not, here, create a plan that he saw or felt or believed
8 contained any partisan effect or bias that violated the Fourteenth Amendment. He
9 would not have put forth a plan if the evidence supported a determination that the
10 plan violated the Voting Rights Act. He would not have created a plan that would fail
11 to withstand strict scrutiny. In his consideration of secondary factors, he would not
12 have created a plan that, in his view, failed to protect communities of interest.

13 Reapportionment cases are known for their rampant partisanship, whether at
14 the legislative level or in the court. The cases are complex. Population increase over
15 ten years requires change. Redistricting is necessary. Expert map drawers, political
16 scientists, and historians are involved. Witness testimony and documentary evidence
17 fills volumes. The quest for the perfectly neutral reapportionment map devoid of
18 partisan effect or bias is illusory. Parties and courts quote what they want from the

1 United States Supreme Court and lower federal courts, as well as from state courts,
2 for favorable language to support their positions.

3 The overriding goal is population equality and to serve the constitutional
4 principle of “one man-one vote.” Once in court, the search involves pathways
5 through various proposed plans offered by partisans. Those in power want to keep
6 their seats and obtain more seats; those out of power want to keep their seats and
7 obtain more seats. The court must give thoughtful consideration to the plans and
8 listen to the arguments. First and foremost, the court sits in equity and tries to
9 structure a plan within the constraints of the Fourteenth Amendment and the Voting
10 Rights Act.

11 If, in drawing a plan, the court exceeds minimal population deviation, the court
12 must justify the deviation based on legitimate state interests which appear to consist
13 of traditional state redistricting policies and practices. Here, the court started with the
14 clear constitutional mandate of minimum deviation from population equality. At
15 some point, Judge Hall determined that he was required to substantially deviate from
16 population equality with regard to Native American communities in order to satisfy
17 the requirements of the Voting Rights Act. Judge Hall appropriately justified the
18 deviation. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (explaining what

1 proof is necessary for a court to find a violation of Section 2 of the Voting Rights
2 Act).

3 With respect to the population deviation that Judge Hall maintained at minimal
4 levels, he had nothing to “justify” because that minimal deviation is what the law
5 requires unless a deviation is necessary to satisfy legitimate state interests. Those
6 attacking minimal deviation have the burden of advocating for a particular deviation
7 and then justifying the deviation based on legitimate state interests. To the extent
8 parties launched that attack, Judge Hall determined that the evidence presented was
9 insufficient to require a deviation. To the extent that parties attacked Judge Hall’s
10 plan because it unfairly diluted Hispanic voting power, Judge Hall determined that
11 the evidence presented was insufficient to support any claimed violation of the
12 Fourteenth Amendment or the Voting Rights Act. Moreover, all of the plans split
13 some communities of interest. Furthermore, communities of interest are defined in
14 many different ways, they are what they are based on the eyes of the beholder, and
15 are, for the most part, partisan driven.

16 The parties now attacking Judge Hall’s plan submitted extensive requested
17 findings of fact and conclusions of law stating the various reasons why their
18 respective plans should be adopted by the court. Judge Hall did not adopt their

1 requested findings, thereby effectively finding against those parties and the propriety
2 of their plans. The parties have not attacked with the required specificity Judge
3 Hall's findings of fact, among which are: that his plan includes thirty districts with
4 Hispanic voting age population over 50 percent, maintaining the highest number of
5 districts with a Hispanic voting age population over 50 percent [FOF 71]; that
6 incorporating the Native American plans caused the number of swing districts of 49-
7 51 percent to increase from five to eight, and the number of majority Republican
8 performance districts (over 50 percent) to reach 34 [FOF 72]; that his plan avoids
9 splitting communities of interest (particularly the Native American communities of
10 interest) to a reasonable degree [FOF 74]; that he gave thoughtful consideration to all
11 plans (plus amended, modified, and alternative), including the unenacted Legislative
12 Plan [COL 27, 28]; that he considered the totality of circumstances when considering
13 whether the plan violated the Voting Rights Act [FOF 22].

14 The issues on which the Majority want to remand this case are intensely fact-
15 based and fact-driven. This Court should not and has no need to (1) disregard the
16 exceptional care Judge Hall took in determining whether the parties attacking the plan
17 and advocating their own plans fulfilled their proof burdens and (2) draw a
18 conclusion that, as a matter of law, those parties proved a Fourteenth Amendment or

1 Voting Rights Act violation or that some secondary factor necessarily overrides the
2 plan.

3 Nothing in this case shows that Judge Hall failed to consider all of the evidence
4 presented. Nothing shows that he failed to give thoughtful consideration to
5 everything offered by the parties. From the record and from his extensive findings
6 of fact and conclusions of law, it is readily apparent that Judge Hall considered all of
7 the evidence and gave thoughtful consideration to the presentations of the parties.

8 Judge Hall looked at the various plans, discussed his concerns about several
9 of them, and made suggestions to parties about how they might improve the
10 palatability of their plans by considering certain changes. Some made changes;
11 others did not. This was the process Judge Hall chose instead of attempting to draw
12 a virgin plan. In fact, to adopt aspects of plans proposed by the executive and
13 legislative parties following extensive testimony and plan modifications indicates a
14 process that considers the will of the people.² I do not agree with the Majority that
15 Judge Hall's process was flawed because it did not satisfy a requirement of judicial

16 ²I note that the "will of the people" was involved here from start to finish.
17 While the legislative plan passed the House, all Republicans and a few Democrats
18 voted against passage, the Governor vetoed the plan, any veto override was unlikely
19 and not attempted, Judge Hall rejected the legislative plan, and several parties
20 advocating their interests fully presented their positions and views at trial.

1 neutrality or independence.

2 In my view, nothing in the Majority's cited case of *Peterson v. Borst*, 786
3 N.E.2d 668 (Ind. 2003), which involved a City-County redistricting plan, requires
4 remand. I see no basis on which to question Judge Hall's or "the judiciary's"
5 neutrality and independence given the nature of the trial; the manner in which Judge
6 Hall conducted the trial; the parties' full opportunity to present their witnesses,
7 documents, and arguments; Judge Hall's detailed study of the various plans; and his
8 interactions with the parties and recommended plan changes. Judge Hall handled this
9 case "in a manner free from any taint of arbitrariness or discrimination." *See id.* at
10 672 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

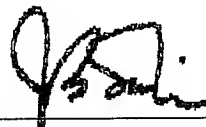
11 Ultimately, based on how he viewed all of the various plans and any
12 modifications made, and based on how he evaluated the credibility of the witnesses,
13 the models, the various analyses, and the reasonableness of testimony and counsel's
14 arguments, Judge Hall thought that the Executive Plan, as modified, was a fair,
15 reasonable, and appropriate plan.

16 All plans suffered from partisan effect. Will any plan be devoid of some
17 partisan effect? The parties that contend that the plan must be overturned state the
18 standard to be "severe" and "significant" partisan bias. There exists no evidence in

1 this case that Judge Hall intended or adopted a plan that violated the Fourteenth
2 Amendment because of severe or significant partisan bias. Nothing in the plan shows
3 any egregiousness, and nothing in the evidence indicates that any attempt at neutrality
4 (which, although not a word used in the Order, is what I believe the Majority actually
5 requires) or, even as the Order indicates, “less partisan effect,” will relieve the
6 challengers or the Majority of their view that any Republican advantage that results
7 in seat gain from the status quo constitutes a partisan bias that violates the Fourteenth
8 Amendment. Democrats keep their statewide majority under the plan. Several
9 districts with Republican advantage are competitive. Judge Hall’s plan was in no way
10 driven by partisan bias. Nothing in the record indicates that Judge Hall’s goal, much
11 less overriding goal, was to effect partisan change. If the Majority wants Judge Hall
12 to move things around to obtain “less partisan effect,” does that take us to some sort
13 of status quo, and will the status quo violate population shifting requirements? The
14 answer to the question of partisan bias can depend in part on tests or models used.
15 Several were under consideration. Judge Hall was not required to apply any one of
16 them in particular or to rely on them as the sole basis on which to decide whether the
17 proof showed a partisan effect or bias that violated the Fourteenth Amendment.
18 Furthermore, no evidence bound Judge Hall to find that there was actual harm or

1 undue prejudice to Democrats, who continue to maintain a majority of the seats in the
2 House.

3 There exists no basis on which to learn more from Judge Hall on any issue.
4 Nothing in the record shows that Judge Hall abused his discretion in any respect. He
5 did not misapprehend or misconstrue the law. He was in no way arbitrary. He does
6 not need to provide further explanation about his determinations. Nothing proves that
7 the plan will create serious problems in the future. This matter is not in need of
8 remand. Judge Hall's plan is an appropriate stopping place. The election process
9 needs to go forward now, without a delay of reconsideration or instruction essentially
10 requiring Judge Hall to reduce Republican seats, without the delay of a 706 expert
11 already shown through his testimony to have opinions about issues in the case, and
12 without a delay involving the required opportunity to comment on any new plan or
13 any changes. The stopping point of Judge Hall's plan is eminently more wise and fair
14 than the stopping point of the next, reconstituted plan, with no fair opportunity to
15 follow allowing the party opposing the plan to obtain relief in this Court.

16
17 

JONATHAN B. SUTIN, Judge